

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE No. 04-239

CASE NO. SC05-851

JUDGE RICHARD H. ALBRITTON, JR.

**PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE,
MOTION TO COMPEL SPECIAL COUNSEL TO PRODUCE
DOCUMENTS REVIEWED BY THE INVESTIGATIVE PANEL IN
FINDING PROBABLE CAUSE**

COMES NOW, the Honorable Richard H. Albritton, Jr., by and through his undersigned counsel, and hereby respectfully requests this Court to compel Special Counsel to adhere to Florida Judicial Qualifications Commission Rule 12(b) and Florida Bar v. Graziano, 696 So. 2d 744 (Fla. 1997), by disclosing evidence presented to the Investigative Panel upon which amended formal charges were based. Specifically, Judge Albritton requests the Court to compel disclosure of witness summaries which were prepared by its investigator and delivered to the Investigative Panel for its consideration of whether probable cause existed to support formal charges.

Respondent has previously requested these documents through a Request for 12(b) Materials. In response, Special Counsel claimed that the witness summaries provided to the Investigative Panel could not be disclosed to the Judge. Judge Albritton then filed a Motion to Compel with the Chair of the Hearing Panel which

was denied. The full Hearing Panel subsequently upheld the Chair's Order denying the Motions to Compel. Judge Albritton now seeks relief from this Court and sets forth the following facts and argument in support.

1. Respondent filed his Demand for Rule 12(b) Materials on July 28, 2005. (See Demand for Rule 12(b) Materials, attached as Appendix A).

2. Special Counsel filed its Response to Demand for Rule 12(b) Materials on August 19, 2005, and forwarded transcripts of testimony given by Judge Albritton dated February 11, 2005 and July 27, 2001, as well as transcripts of testimony given in earlier unrelated proceedings by Shayma Salmon, Melissa Bowers, Sandra Childers, Sandra Atkins, Peggy Roell, Tara Melton, Richard Dale Ogburn, and John A. Williams dated July 27, 2001. Only Tara Melton, Peggy Roell and John Williams are listed in the JQC's witness list of twenty-four witnesses. (See Response to Demand for Rule 12(b) Materials, attached as Appendix B).

3. On September 20, 2005, the undersigned counsel wrote to Special Counsel and requested the witness' statements of the remaining twenty-one witnesses that are expected to offer testimony on behalf of the JQC at the Formal Hearing. (See letter dated September 20, 2005 from Scott K. Tozian, Esquire, to David T. Knight, Esquire, attached as Appendix C).

4. On September 21, 2005, Special Counsel, David T. Knight, Esquire, responded to the request for witness statements and indicated that he was in possession of summaries of interviews taken by an investigator hired by the JQC, but claimed the documents were privileged and refused to produce them. (See letter dated September 21, 2005 from David T. Knight, Esquire, to Scott K. Tozian, Esquire, attached as Appendix D).

5. Robert W. Butler, the investigator who conducted witness interviews and prepared the witness summaries, attests in his affidavit that the summaries currently being withheld were provided to the Investigative Panel. (See Affidavit, attached as Appendix E).

6. Judge Albritton made several good faith, but unsuccessful, attempts to request Special Counsel to furnish the statements as required by Rule 12(b). (See letters dated September 26, 2005 and September 28, 2005, attached as Composite Appendix F).

7. After the failed attempts to resolve this discovery dispute, Respondent filed a Motion to Compel with the Judicial Qualifications Commission Hearing Panel requesting compliance with Florida Judicial Qualifications Commission Rule 12(b). (See Respondent's Motion to Compel, dated November 2, 2005, attached as Appendix G).

8. Judicial Qualifications Commission Special Counsel, Mr. David T. Knight, served his response on December 18, 2005, claiming that the witness statements were protected by the “work product doctrine” and should not be disclosed pursuant to Florida Rule of Civil Procedure 1.280. (See Judicial Qualifications Commission’s Memorandum in Opposition to Respondent’s Motion to Compel, attached as Appendix H).

9. This response failed to address the central issue as to whether disclosure was required under Florida Bar v. Graziano, 696 So. 2d 744 (Fla. 1997), because this evidence, consisting of witness statements or summaries, was provided to the Investigative Panel for its consideration in determining probable cause. Accordingly, Respondent filed a Reply to the JQC’s Memorandum in Opposition. (See Respondent’s Reply to the JQC’s Memorandum in Opposition to Respondent’s Motion to Compel, attached as Appendix I).

10. On January 26, 2006, the Hearing Panel Chairman, the Honorable James R. Wolf, denied Respondent’s Motion to Compel and granted the JQC’s Motion to Compel the deposition of Judge Albritton. (See Order on Motions to Compel, attached as Appendix J).

11. On January 30, 2006, Respondent served his Petition for Review of Order on Motions to Compel directed to the full Hearing Panel pursuant Florida Judicial Qualifications Commission Rule 7(b). (See Petition for Review of Order

on Motions to Compel, attached as Appendix K).

12. Special Counsel filed a Memorandum in Opposition to Petition for Review of Order on Motions to Compel on February 20, 2006, acknowledging that the JQC investigator “provided copies of these typed interview summaries to Thomas C. McDonald, Jr., General Counsel to the JQC, who later submitted them to the Investigative Panel of the JQC, prior to its finding of probable cause to institute formal charges against Judge Albritton.” However, Special Counsel simultaneously and inconsistently contended that the summaries should not be produced because the “interview summaries have never been introduced as evidence against [Judge Albritton].” (See Memorandum in Opposition, p. 3, attached as Appendix L).

13. On March 14, 2006, the full Hearing Panel denied Respondent’s Petition for Review of Order on Motions to Compel. (See Order on Full Panel Review, attached as Appendix M).

14. On March 14, 2006, the Chair of the Hearing Panel also ordered Special Counsel to create a privilege log and produce all documents previously submitted to the Investigative Panel for its consideration. (See Order Setting Prehearing Conference, attached as Appendix N). Once Special Counsel complies with the Hearing Panel’s Order, every participant in the JQC proceeding, including the Investigative Panel and the Hearing Panel, will have had the opportunity to

review the witness summaries previously used against Judge Albritton, with the sole exception of Judge Albritton.

ARGUMENT

Judge Albritton's entitlement to all witness statements used to find probable cause is well established. Florida Judicial Qualifications Commission Rule 12(b) requires Special Counsel to "promptly furnish" the responding judge with "copies of all written statements and transcripts of testimony" of any witness whom Special Counsel expects to call at trial. The Florida Supreme Court has held that "discovery pursuant to Rule 12(b) allows an accused judge to have full access to the evidence upon which formal charges are based." In re Graziano, 696 So. 2d 744, 751 (Fla. 1997) (*emphasis added*). In fact, the Graziano court determined that these liberal discovery rights justified the continuing confidentiality of the original complaint. Id. at 751-52.

The Florida Supreme Court reiterated Special Counsel's obligation enunciated in Graziano under strikingly similar circumstances in the JQC proceeding against Cynthia A. Holloway, Inquiry Concerning a Judge, Cynthia A. Holloway, No. 00-143, Supreme Court Case No. SC00-2226. Specifically, the Florida Supreme Court determined that witness statements made to the JQC's investigator must be provided to the accused judge if the statements or statement summaries were used to find probable cause. In Holloway, Special Counsel

refused to turn over summaries of witness statements made to the JQC investigator, claiming that the summaries were privileged. As a result, Judge Holloway filed a Motion to Compel with the Hearing Panel which was denied. (See Motion to Compel, dated January 31, 2001 and the Hearing Panel's Order on the Motions for Protective Order and to Compel, dated February 20, 2001, attached as Composite Appendix O). Thereafter, Judge Holloway filed her Motion to Compel with the Florida Supreme Court on February 21, 2001. (See Motion to Compel, attached as Appendix P). On February 22, 2001, the Supreme Court requested the JQC to file a response within one working day to the respondent's Motion to Compel. (See Order of the Supreme Court, dated February 22, 2001, attached as Appendix Q).

The JQC filed a nine-page response in Holloway arguing that the witness statements were prepared in anticipation of litigation, and were thus protected by the work-product doctrine. In addition, Special Counsel asserted that the witness' statements to the JQC's investigator and the resulting witness summaries did not fall within the purview of Rule 12(b) because they were not "statements" as defined by Florida Rules of Civil Procedure. (See JQC's Motion in Opposition, dated February 23, 2001, attached as Appendix R). The same day the JQC filed its response, the Florida Supreme Court entered its Order granting Judge Holloway's Motion to Compel and ordered the JQC to produce all statements used to determine probable cause, citing Florida Bar v. Graziano, 696 So. 2d 744 (Fla.

1997). (See Order dated February 23, 2001, attached as Appendix S). Following the Court's February 23, 2001 Order, Special Counsel promptly furnished copies of all witness summaries taken by the JQC investigator. (See letter dated March 1, 2001, attached as Appendix T).

In this matter, the Hearing Panel once again determined that disclosure was not required because the summaries do not constitute a "statement" under the Rules of Civil Procedure. Regardless of how the word "statement" is defined in the Rules of Civil Procedure, the Florida Supreme Court has clearly held that an "accused judge" must have "full access to the evidence upon which formal charges are based." See Graziano at 751-752. If the witness summaries were provided to or considered by the Investigative Panel in finding probable cause, these documents must be disclosed to Judge Albritton regardless of whether they are ultimately classified as "summaries," "statements," or other evidentiary material. Moreover, the Court required disclosure of witness summaries in Holloway.

If disclosure is not required, the JQC would be permitted to alter the method by which it gathers testimonial evidence (*i.e.* by failing to contemporaneously record the witnesses' statements and instead encouraging the investigator to "summarize" the witnesses' statements after the interview), and therefore circumvent the broad discovery rights guaranteed to an accused judge. While Special Counsel may certainly control the manner in which it chooses to

investigate its case, the JQC should be prohibited from choosing to submit witness summaries as evidence at the 6(b) hearing to support a probable cause finding and then subsequently claiming that these summaries should not be disclosed because they are not technically witness “statements.”

Contrary to Special Counsel’s assertions, Judge Albritton is not attempting to gain access to work product materials. Any witness summary provided to the Investigative Panel as evidence in the Rule 6(b) hearing lost any “work product” status that it would have held had they not been submitted to support a probable cause determination. The Florida Supreme Court has repeatedly held as follows:

Any work product privilege that existed . . . ceases once the materials or testimony are intended for trial use. More simply, if the materials are only to aid counsel in trying the case, they are work product. But if they will be used as evidence, the materials . . . cease to be work product and become subject to an adversary’s discovery.

Northup v. Acken, 865 So. 2d 1267, 1270 (Fla. 2004)(quoting Dodson v. Persell, 390 So. 2d 704, 707 (Fla. 1980)). The Court further emphasized:

[W]e reiterate our dedication today to the principle that in Florida, when a party reasonably expects or intends to utilize an item before the court at trial, for impeachment or otherwise, the video recording, document, exhibit, or other piece of evidence is fully discoverable and is not privileged work product.

Northup at 1270. In this case, the JQC’s counsel made the decision to use the summaries as evidence before the Investigative Panel. Special Counsel does not

contest that these witness summaries were used by the Investigative Panel in finding probable cause to support the charges set forth in the Notice of Amended Formal Charges. (See Affidavit of Robert W. Butler, attached as Appendix E, and JQC Memorandum in Opposition, p. 3, attached as Appendix L). As a result, the summaries could not be categorized as work product intended solely to assist counsel in their preparation for trial.

The JQC has forced Judge Albritton to incur attorney's fees to enforce his entitlement to review evidence upon which the Investigative Hearing Panel found probable cause. It is respectfully requested that this Court require Special Counsel to reimburse Judge Albritton for the attorney's fees he has unnecessarily incurred in enforcing his request to review discovery materials. See Fla. R. Civ. P. 1.380(a)(4).

WHEREFORE and by reason of the foregoing, Respondent respectfully requests the full Hearing Panel to compel Special Counsel to comply with the holding in Graziano and disclose all evidence, including witness summaries, that was presented to the Investigative Panel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of March, 2006, the original and seven copies of the foregoing Petition for Writ of Mandamus, or in the Alternative, Motion to Compel Special Counsel to Produce Documents Reviewed by the Investigative Panel in Finding Probable Cause have been filed via [e-file@flcourts.org](mailto:file@flcourts.org) and furnished by FedEx overnight delivery to:

Honorable Thomas D. Hall
Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927

with copies by U. S. Mail to:

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